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THE LAW COMMISSION

FIRST PROGRAMME: ITEM IX: TRANSFER OF LAND

WORKING PAPER No. 37

LAND REGISTRATION (SECOND PAPER)

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PART A. INTRODUCTION

This is the second in the series of Working Papers on Land Registration which we are publishing for comment and criticism. In it we deal with two topics, overriding interests (in Part B) and the Minor Interests Index (in Part C).

Our first Working Paper on Land Registration (No.32) was published in September 1970. The Introduction to that Paper (Part A) was intended as a general introduction to the series and in it we gave a brief description of the Land Registration system and its history and objectives.

A summary of our provisional conclusions upon which we would like to obtain comments is set out in Part D at pages 59 to 61

PART B. OVERRIDING INTERESTS

I. GENERAL

The nature of overriding interests

1. In the introduction to our first Working Paper on Land Registration[1] we briefly described the manner in which various types of interest in land are treated under the Land Registration Act 1925. We there explained that the system is based on the

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1. Working Paper No. 32. Part A. pp. 1-10.

registration of the title to legal estates in land, whether freehold or leasehold, and referred to the process of registration of an interest under a separate title as "substantive registration".[2] Interests capable of substantive registration we described as "registrable interests". Interests which are not capable of substantive registration we classified under three heads - mortgages and charges, minor interests, and overriding interests. Mortgages and charges are not "registrable interests" in the sense in which we have used that expression above, since they are not capable of substantive registration as separate and distinct titles; but an entry of the charge and the name of its proprietor has to be made in the register of the relevant title. Minor interests comprise in general all interests in registered land other than (i) interests capable of registration or protection on the register when so registered or protected, and (ii) overriding interests.

2. In the context of land registration, the feature common to registrable interests, mortgages and charges and many minor interests, is that they require to be protected or recorded in some way at the Land Registry. Overriding interests, however, (as the name suggests) bind a purchaser notwithstanding the absence of any mention of them on the register. All registered land is deemed to be subject to subsisting overriding interests.[3]

3. Overriding interests are defined as meaning "all the incumbrances, interests, rights and powers not entered on the register but subject to which registered dispositions are by this Act[4] to take effect ..."[5] Section 70(1) of the Act

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2. In para. 13 of Working Paper No. 32 we discussed the differences between substantive registration and noting on the register.

3. Land Registration Act 1925, s.70(1). (Overriding interests are not treated as incumbrances within the meaning of the Act).

4. i.e. The Land Registration Act 1925. In this Paper we refer to that Act as "the Act" and to the Land Registration Rules 1925 as "the Rules".

5. s. 3(xvi).

contains a list of overriding interests, examples of which are certain leases,[6] rights of occupiers, legal easements and profits, public rights, local land charges and rights acquired or being acquired by adverse possession under the Limitation Act 1939. This list must be supplemented by the matters in rule 258[7] together with tithe redemption annuities[8] and the rights of the National Coal Board in respect of mines and minerals.[9] (The text of section 70 as now in force is set out in Appendix 1).

Reasons for the existence of overriding interests

4. Perhaps the most important question which needs to be answered is why all relevant interests should not be recorded on the register of the title to the land which they affect. There are, we think, two main reasons for this. The first is that the nature of the majority of the matters which can constitute overriding interests is such that recording on the register is either unnecessary, impracticable or undesirable. (Later in the Paper we discuss the matters falling under each head of overriding interest with a view to ascertaining how far, if at all, the categories could be reduced). The other main reason is, perhaps, more fundamental. It is that it was never contemplated, under the registration system as we know it, that all interests in land would be recorded on the register. As we have explained in the introduction to our first paper on Land Registration,[10] the register was intended as a substitute for the title deeds and nothing more. Matters not shown in the deeds are not, therefore, normally shown on the register. Unrecorded interests are not peculiar to "registered" conveyancing; they have always existed in

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6. i.e. leases for not exceeding 21 years at a rent without a premium.
7. See paras. 48 and 49 below.
8. Tithe Act 1936, s.13(11).
9. Coal Act 1938, s. 41.
10. para. 6.

unregistered conveyancing and it was necessary to find a place for them within the framework of the registration system. The Royal Commission upon whose recommendations title registration was introduced into this country[11] put the matter as follows:-

> "The register will be a substitute for the documentary or parchment title. But the registered ownership ... will remain subject, as the fee simple now is, ... to such other rights as are not usually included in the abstract of title ... These are rights which are commonly evidenced by known usage or continued enjoyment or may be ascertained on the spot by inspection or enquiry; and the title to them is generally so independent of the documentary title to the property that they will necessarily form a partial exception to that which will constitute the registered ownership."[12]

5. More recently overriding interests have been described in general terms as follows:-

> "Overriding interests are, speaking generally, matters which are not usually shown on title deeds or mentioned in abstracts of title and as to which, in consequence, it is not possible to form a trustworthy record on the register. As to such matters, persons dealing with registered land must obtain information outside the register in the same manner and from the same sources as people dealing with unregistered land would obtain it."[13]

Categories of overriding interests

6. The list of overriding interests contained in section 70(1) of the Act has been described as "somewhat inconsequential and jumbled"[14] and it is difficult to disagree with that description.

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11. The Royal Commission reported in 1857.
12. para. 63 of the report of the 1857 Royal Commission.
13. National Provincial Bank Ltd. v. Hastings Car Mart Ltd. [1964] Ch. 9 at 15 per Cross J.
14. Curtis and Ruoff, Registered Conveyancing 2nd ed. 108.

Because overriding interests are of such varied kinds orderly description is by no means easy. They do, however, now seem to fall into one or more of three categories as follows:-

(i) Matters not usually shown in title deeds

(a) Public rights (section 70(1)(a)).

(b) Easements and profits acquired by prescription (section 70(1)(a)).

(c) Rights acquired or in the course of acquisition under the Limitation Act 1939 (section 70(1)(f)).

(d) Rights of occupiers (section 70(1)(g)).

(ii) Matters registrable in other registers

(a) Rights of common[15] (section 70(1)(a)).

(b) Tithe redemption annuities[16]

(c) Local land charges[17] (section 70(1)(i)).

(iii) Matters which it may be difficult or undesirable to record

Some of the matters which fall within the various classes mentioned in (i) above could also fall into this category, in that they may be difficult or impossible to record accurately on a register. Examples of other matters which it might in some cases be impracticable to record are short or periodic tenancies, particularly where they were entered into informally; and it is presumably for that reason (among others) that such tenancies are overriding interests under section 70(1)(k). Apart from any practical difficulties, to require all such tenancies to be recorded might also be undesirable as being

15. Registrable under the Commons Registration Act 1965.
16. See Tithe Act 1936.
17. Registrable under the Land Charges Act 1925.

unfair to tenants who were not legally represented and who were unaware of the requirement.

Conflict of interest between purchasers and those entitled to the benefit of overriding interests

7. From the point of view of purchasers[18] of registered land, it is clearly desirable that as many as possible of the matters which may burden the land should be recorded on the register of the title to the land. We aim at simplifying conveyancing and a reduction in the number of overriding interests would contribute to that end. A balance must, however, be maintained between, on the one hand, the interests of purchasers of land and, on the other, the legitimate interests of those who have rights in the land which might be prejudiced by a requirement that such rights must be recorded on the register to be binding on a purchaser. Those who advocate eliminating or drastically reducing the number of overriding interests sometimes, we think, tend to look at the matter solely from the point of view of purchasers of land without paying sufficient regard to the interests of others.

Recording of overriding interests

8. To keep the matter in perspective it has to be borne in mind that on many occasions matters which are included in the list of overriding interests do not constitute such interests in relation to a particular title because they have been entered on the register of that title.[19]

9. An entry on the register is almost invariably made in the case of those easements and other appurtenant rights which have been expressly created. Where an easement, right, benefit or privilege has been created by instrument before the

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18. In this Paper, unless inconsistent with the context, the word "purchaser" includes a lessee or a mortgagee.

19. By definition an overriding interest is an interest not entered on the register. (s. 3.(xvi)).

burdened land is registered and it appears on the title,[20] section 70(2) provides that the Registrar shall on first registration enter a note of it on the register.[21] And where the burdened land is already registered, the express creation of any such right will, if the terms of the Act are observed, result in the making of an entry on the register because it constitutes a disposition by the proprietor of the land which, to use the terminology of the Act, has to be "completed by registration".[22] In practice, the easements and profits which are overriding interests are generally confined to those of which there is no documentary evidence.

10. There are in addition other provisions which are designed to bring onto the register matters which would otherwise constitute overriding interests, but these provisions (unlike section 70(2)) are discretionary. One of them is subsection (3) of section 70 which reads as follows:-

> "Where the existence of any overriding interest mentioned in this section is proved to the satisfaction of the registrar or admitted, he may (subject to any prescribed exceptions) enter notice of the same or of a claim thereto on the register, but no claim to an easement, right or privilege not created by an instrument shall be noted against the title to the servient land if the proprietor of such land (after the prescribed notice is given to him) shows sufficient cause to the contrary."

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20. Where legal easements or rights have been expressly granted over unregistered land, the likelihood of their being noted on the title to that land when it comes to be registered will be enhanced if a suitable memorandum is endorsed on one of the principal title deeds in the possession of the grantor.

21. Subject to r.199 (which provides that the Registrar is not required to enter notice of any liability, right or interest which appears to him to be of a trivial or obvious character, or the entry of which on the register is likely to cause confusion or inconvenience) it appears from the judgment of Diplock L.J. in Re Dances Way, West Town, Hayling Island [1962] Ch. 490 that s.70(2) is mandatory.

22. s. 19(2) (freeholds): s. 22(2) (leaseholds).

This provision covers a much wider area than subsection (2) in that its application is not restricted to the occasion of first registration; it relates to any overriding interest and not merely to those in the nature of easements; and the rights in question need not have been created by an instrument. The procedure for applications made under section 70(3) is to be found in rule 197.

11. Another provision is rule 41(1):-

> "Notice of an easement, right or privilege created by an instrument and operating at law which appears to the Registrar to affect adversely the land shall, if the Registrar thinks fit, be entered in the register."

This rule (which like section 70(2) applies only on first registration)[23] covers a wider area than section 70(2) in that it would permit the entry of an easement which although created by an instrument did not appear on the title. On the other hand its subject matter is much narrower than that of section 70(3).

Protection as overriding interests of matters capable of protection by registration or noting

12. It might have been expected that a clear distinction would have been made in the Act between those matters which are protected although not entered on the register (i.e. overriding interests) and those which are required to be protected either by substantive registration or noting on the register. This, however, is not the case and in paragraphs 13 to 21 we discuss the difficulties which this creates and put forward certain possible solutions to them.

Creation of interests which require to be completed by registration

13. Under paragraph (a) of section 70(1) of the Act, various matters (including legal easements and profits) are treated as

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23. As appears from the heading of Part II of the Rules, in which r.41 is contained.

overriding interests. Under a different set of provisions of the Act, certain interests, if created out of registered land, must, as we have already mentioned in paragraph 9 above, be "completed by registration" and be noted on the register of title to the burdened land, in order to perfect the title to the interest created. The express creation out of registered land of some interests named in paragraph (a), will, therefore, result in the interest being recorded on the register. It must, we imagine, have been the intention of the legislature that such expressly created interests should never constitute overriding interests because, by definition, an overriding interest is an interest which is not entered on the register.[24] Nevertheless, there is nothing in section 70 which in terms prevents a matter which ought to be recorded on the register from constituting an overriding interest while it is not so recorded. Be that as it may, our view is that if an interest (an easement, for example) is created out of registered land and is not noted on the register when the Act requires it, it should not be an overriding interest.[25] The Act should be amended to make this principle clear.

Interests which ought to be substantively registered

14. Under paragraph (g) of section 70(1), protection as an overriding interest is given to "the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof ..." A person may be in occupation of registered land by virtue of his having a registrable lease or transfer which ought to have, but has not, been registered. Should he, therefore, have protection for that interest as an overriding interest where he has failed to register? We think not. The efficient operation of any system of land registration

24. s. 3(xvi).

25. Under r.199 the Registrar is not required to enter notice of any liability, right or interest which appears to him to be of a trivial or obvious character, or the entry of which on the register is likely to cause confusion or inconvenience. Any matter which is not noted on the register as the result of the application of this rule must clearly constitute an overriding interest.

requires that all registrable interests should be promptly registered and any provision which might seem to discourage registration should be avoided as a matter of principle. Our present view is that no interest which ought to be registered substantively should be an overriding interest.[26]

Interests which may be protected on the register by notice, caution or restriction

15. Different considerations may apply where the interest is not capable of substantive registration but is nevertheless susceptible of protection in some other way (e.g. by notice or caution). Interests of this kind include, for example, rights under contracts for sale or agreements and options for the grant or renewal of leases, and other matters which, in relation to unregistered land are land charges and thus require registration under the Land Charges Act 1925 to be binding on a subsequent purchaser.

16. The broad scheme of the 1925 property legislation was to make registration, and not notice (actual or constructive), the sole factor in determining whether such an interest is enforceable against a purchaser of unregistered land. In the result, certain interests which would before 1926 have been enforceable against a purchaser because he had notice of them are not now so enforceable unless they have been registered.

17. As we have already pointed out,[27] the Act and its predecessors set out to establish a conveyancing system and not to alter the substantive land law. Accordingly it should follow that land charges would be treated in the land registration legislation in much the same way as they are treated under legislation applicable to unregistered land. Section 59(6) of the Act, for example, provides:-

> "(6) Subject to the provisions of this Act relating to fraud and the title of a trustee in bankruptcy, a purchaser acquiring title under a registered

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26. As to the protection of a registrable interest pending registration see para. 67 below.

27. First Paper para. 6.

disposition, shall not be concerned with any pending action, writ, order, deed of arrangement, or other document, matter, or claim (not being an overriding interest) which is not protected by a caution or other entry on the register, whether he has or has not notice thereof, express, implied or constructive."

18. None of the matters which are registrable under the Land Charges legislation (except local land charges) is stated to be an overriding interest under the (Land Registration) Act. One would, therefore, expect that matters which, in relation to unregistered land, are registrable under the Land Charges Act, would in the case of registered land require entry on the register to bind a purchaser. Although the principle is generally followed in the Land Registration legislation, there are nevertheless some cases in which the interest of a person under an unprotected "land charge" has been held to be binding on a purchaser of registered land as an overriding interest if that interest is coupled with occupation.[28] This is because the rights of occupiers which are protected as overriding interests under section 70(1)(g) of the Act are not, it seems, confined to those rights which are incapable of protection on the register under the Act.

19. The fact that an interest which is capable of protection on the register can constitute an overriding interest seems inconsistent with the general rule in relation to unregistered land to which we have referred above, that an unprotected land charge is void against a purchaser even if he has notice of it. This inconsistency may well not have been intended and the question arises whether the law should be changed.

20. The absolute rule applying to unregistered conveyancing has its critics;[29] and it is perfectly true that it can produce results on particular facts which cannot be regarded as fair. It is easy to overlook (or even be unaware of) the

28. See for example Woolwich Equitable Building Society v. Marshall [1952] Ch.1 (agreement for tenancy), Bridges v. Mees [1957] Ch.475 (contract for sale) and Webb v. Pollmount [1966] Ch.584 (option to purchase in a lease).

29. See, for example, Megarry and Wade, The Law of Real Property 3rd ed. 1128.

necessity to protect an option to purchase or to renew, which is contained in a lease; and a tenant who has failed to register such an option in the Land Charges Registry will find that he cannot enforce it against a purchaser of the reversion even if that purchaser had full knowledge of the existence of the option.[30] On the other hand, if the purchaser had no actual notice of the unregistered option (because, for example, it is contained in a separate document) he is the more "innocent" of the two and in these circumstances it is clearly arguable that his rights should prevail. We recognise the difficulties involved in attempting to reconcile the conflicting interests of the option-holder and the subsequent purchaser, but on balance we think that it would be a retrograde step to abandon (for unregistered conveyancing) the simple, certain rule that registration and only registration constitutes notice of a registrable land charge; and if that is the right view it seems to us that there is no justification for having a different rule in registered conveyancing. We would add that since an option is most commonly contained in the lease itself, the risk of its failing to be separately noted on the register is perhaps less where the land is registered than where it is unregistered, because the transaction (depending on the circumstances) may involve an application to the Land Registry to register the lease itself. Our provisional conclusion is that there should be excluded from the category of overriding interests not only all those interests which the Act requires to be entered on the register, but also, in principle, all those matters which are, in relation to unregistered land, registrable in the register of land charges under the Land Charges Act 1925, and for which the (Land Registration) Act makes corresponding provision for entry by way of notice, caution, restriction or inhibition.[31]

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30. The tenant may, of course, have an effective claim for damages against his original landlord. cf. Wright v. Dean [1948] Ch.686.

31. See s.59.

21. We do, however, think that there is one area in which that rule need not operate fully in relation to permitted entries. It is an old-established principle that notice of a tenancy is notice of all its terms (including an option to purchase)[32] and we consider that a purchaser of the freehold or leasehold reversion who has statutory notice from the register of the existence of a subsisting lease or underlease should be fixed with statutory notice of any estate contract actually contained in it, whether or not the tenant has taken the prudent course of procuring the entry in the register of specific reference to such contract. Accordingly, we consider that the Act should make it clear that a purchaser who has acquired notice from the register of the existence of a lease is put on enquiry as to all its terms.[33] That would impose no hardship on the purchaser of the reversion; and it would not constitute an inroad into the suggested rule that unregistered permitted entries should not be overriding interests. But we would take the matter one step further and suggest that as it is incumbent on a prospective purchaser of a reversion to satisfy himself as to the terms of a lease which constitutes an overriding interest, no additional burden would be placed upon him by providing that any estate contract contained in such a lease should also automatically be an overriding interest. That would constitute an exception to the general rule but the infraction is minimal. Put shortly, we suggest that an interest (such as an estate contract) contained in a lease should have the same status as the lease itself and should be protected automatically unless the lease is a

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32. Daniels v. Davison (1809) 16 Ves. 249.

33. It is appreciated that registration of particulars of a charge at the Companies Registration Office has been held not to amount to constructive notice of special provisions in the charge (Re Standard Rotary Machine Co.Ltd. (1906) 95 L.T. 829; Wilson v. Kelland [1910] 2 Ch.306). A purchaser of land from a company, however, who discovered from a search at the Companies Registry the existence of a charge which had not hitherto been disclosed to him, should clearly not proceed with his purchase without satisfying himself as to the actual contents of the charge.

registrable lease which has not been registered. If the lease constitutes an overriding interest the ancillary interest will be one too, notwithstanding that it could be specifically protected on the register.

Overriding interests and the statutory covenants for title

22. The rights of a person entitled to the benefit of an overriding interest cannot be prejudiced by a registered disposition of the land which the interest burdens; for, by definition, an overriding interest is an incumbrance, interest, right or power subject to which a registered disposition is to take effect.[34] Thus, if freehold land, the title to which is registered, is subject to an overriding interest such as a lease for a term of seven years or an easement acquired by prescription, the sale of the burdened land cannot prejudice the rights of the lessee or person entitled to the benefit of the easement. As between a vendor and purchaser of land burdened with overriding interests, the position is regulated by the terms of the contract (if any) and by the covenants as to title given by the vendor in favour of the purchaser in the document by which the transfer of the interest in the land is effected. It is with the covenants for title that we are here concerned.

23. Under the provisions of section 76 of the Law of Property Act 1925, it is possible, by the use of certain key words,[35] to introduce into a conveyance of land implied covenants by the vendor as to his title appropriate to the varying circumstances. If a vendor of freehold land is expressed to convey "as beneficial owner", four covenants are implied; that he has full power to convey, for quiet enjoyment, for freedom from incumbrances and for further assurance. The covenants are not absolute but are qualified in the sense that not every breach gives the purchaser a right of action. For example, they do not cover a breach caused by the act or omission of a

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34. s. 3(xvi).

35. e.g., "as beneficial owner", "as mortgagee", "as trustee".

person through whom the vendor derived title for value. Being qualified, the statutory covenants for title are of limited value to a purchaser.

24. In relation to registered land, rule 76[36] provides that a person may in a registered disposition (e.g. a transfer) introduce the same covenants for title by the use of the same statutory words. No reference to such covenants, however, appears in the register.

25. Since a purchaser of registered land will, when his title is registered, obtain a title which carries, in effect, a state guarantee, it may be asked why covenants for title should be necessary in a disposition of registered land. The answer is that the state guarantee is not in fact absolute, because the title of a registered proprietor (even that of a proprietor registered with an absolute title) is always subject to any existing overriding interests. A purchaser may, therefore, need to have a remedy against his vendor after completion in respect of overriding interests of which he had no notice prior to completion; and it would seem right that, subject to the terms of his contract, he should have such a remedy.

26. The statutory covenants for title do not apply in relation to matters to which a conveyance is expressly made subject and in the application of these covenants to dispositions of registered land rule 77(1) provides that they should take effect as though the disposition had been expressly made subject to certain matters, including:

> "(b) any overriding interests of which the purchaser has notice and subject to which it would have taken effect, had the land been unregistered."

27. The intention behind this provision seems to be clear and, we suggest, is correct. If the purchaser had notice of the overriding interest, he should not have an action against his vendor in respect of it under the covenants for title.

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36. Made under s.38(2).

"Notice" in this context we take to mean notice in the technical sense that the purchaser either has actual knowledge of the matter in question or would have had such knowledge if he had made such enquiries, searches and inspections as a purchaser ought reasonably to have made.[37]

28. Rule 77 deals with the matter, as it must, on the basis that there may or may not have been a contract preceding the disposition in question. Where, as will often be the case, the purchaser acquires knowledge of hitherto undisclosed overriding interests before the purchase is completed, his remedy may be to call off the purchase before the transfer (into which the covenants are introduced) is executed. If, however, the purchaser chooses (or, under the terms of the prior contract, is bound) to complete notwithstanding the knowledge that he has acquired, it is logical that he should not have any right of action under the covenants for title in relation to those matters which he had discovered (or ought to have discovered) at an earlier stage.[38]

29. Doubts have been expressed as to whether or not the statutory covenants for title if introduced into a registered disposition have any application to overriding interests of which the purchaser has no notice.[39] To protect the purchaser it was recommended in one of the principal books of conveyancing precedents, in an edition which has now been superseded, that a transfer of registered land should include a clause expressly making the statutory covenants for title effective in respect of overriding interests of which the

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37. cf. Law of Property Act 1925, s.199(1)(ii).

38. Although he may not have a right of action under the covenants for title, a purchaser may in certain circumstances still have a right of action for breach of contract based on a term of the contract which did not merge in the conveyance or transfer: Lissett v. Reading Roofing Co. [1969] 1 W.L.R. 1757.

39. See (1942) 58 L.Q.R. 356 (Professor Potter); Emmett on Title, 15th ed. 432; (1966) 82 L.Q.R. 428 (Mowbray); and (1961) 105 S.J. 801 and 985.

purchaser had no prior notice and which had not been excluded from the transfer by contract.[40]

30. Contrary views have, however, been expressed[41] and it is perhaps significant that of the current editions of four principal books of precedents used by conveyancers[42] only one contains precedents for such a clause[43] and the editor expresses doubts as to its necessity.[44]

31. We are inclined to agree with those who do not think that any special clause is required because it seems to us that the position under the Act and Rules is reasonably clear. In summary form our view is as follows:-

(a) The covenants for title implied by virtue of section 76 of the Law of Property Act 1925 apply in relation to dispositions of registered land if they are introduced by the use of the appropriate key words. It has been doubted whether the expression "conveyance" as used in the second schedule to the Law of Property Act 1925 includes a transfer of registered land[45] but that the statutory covenants for title are capable of applying to registered dispositions is, we think, demonstrated by section 38(2) of the (Land Registration) Act which is drafted on the footing that the statutory covenants for title may be made to apply to registered dispositions by the use of the key words but that rules may be needed to prescribe the effect of such covenants. Rules (76 and 77) have in fact been made.

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40. Key and Elphinstone's Conveyancing Precedents, 14th ed. vol.3. pp. 128 and 129.

41. (1941) 57 L.Q.R. 566 (Megarry); Key and Elphinstone's Conveyancing Precedents, 15th ed. vol.3, 128; Curtis and Ruoff, Registered Conveyancing, 2nd ed. 366.

42. The Encyclopaedia of Forms and Precedents; Hallett; Key and Elphinstone; Prideaux.

43. Key and Elphinstone 15th ed, vol.3. 402.

44. Ibid. at 128.

45. See Farrand, Contract and Conveyance, 260.

(b) In the absence of a rule prescribing the effect of the covenants in any particular case, it seems that their effect in a registered disposition would be the same as if the land had not been registered (i.e. a covenant is given in relation to any relevant matter to which the conveyance or transfer was not expressly made subject).

(c) The rules prescribe the effect of the statutory covenants for title in relation to overriding interests of which the purchaser has notice by deeming the transfer to have been made expressly subject to those interests.[46] The covenants will, if introduced, apply to all other overriding interests because no specific provision is contained in the rules to deal with them. If, however, the transfer is, in fact, made expressly subject to a particular overriding interest[47] then the purchaser would have had notice of it and the statutory covenants will not apply to it.

32. It may be that in giving our suggested interpretation of the Act and Rules in relation to this difficult matter we have over-simplified the position. If so, we hope that those who disagree with our interpretation will come forward and let us have their reasons in detail.

33. The wording of rule 77(1) has been criticised[48] but our present view, for the reasons given above, is that the Act and Rules seem to deal satisfactorily with the application of the statutory covenants for title to overriding interests affecting registered land. It should perhaps also be mentioned that the key words must have been used in millions of transfers and mortgages of registered titles without, so far as we are aware, any substantial defects coming to light in this context.

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46. r.77(1)(b).
47. Law of Property Act 1925, 2nd Sched. Parts I and III.
48. (1970) 34 Conv. (N.S.) 128 (Professor Crane).

Possible reduction in number of overriding interests

34. As a matter of principle we take the view that, in the interests of certainty and of simplifying conveyancing, the class of right which may bind a purchaser otherwise than as the result of an entry in the register should be as narrow as possible. With the foregoing general observations and preliminary conclusions in mind we consider next the specific heads of overriding interests with a view to seeing how far, if at all, the number of such interests can be reduced.

II. THE SPECIFIC HEADS OF OVERRIDING INTEREST: SECTION 70(1)

Paragraph (a)

> "Rights of common, drainage rights, customary rights (until extinguished), public rights, profits à prendre, rights of sheepwalk, rights of way, water-courses, rights of water, and other easements not being equitable easements required to be protected by notice on the register."

35. The concluding words of the paragraph about equitable easements are ambiguous and various views have been expressed as to their effect on the construction of the paragraph as a whole. As appears below, it is perhaps the history of the drafting of the paragraph which is responsible for the difficulty which has arisen. In any event we are of the opinion that, consistently with the general principles of the Act,[49] only legal interests should be covered and we consider that the Act should make this clear. On a more detailed plane the paragraph may be criticised because it fails to classify in a logical way the subject matter with which it deals. It mixes public and private rights. It also specifies certain kinds of easements (e.g. rights of way) and not others (e.g. rights of support or light); but the general intention of the paragraph seems to be at least to include everything in the nature of easements and profits. The jumbled nature of the paragraph is probably due to its history. The corresponding paragraph of section 18 of the Land Transfer Act 1875 read

49. cf. r.254(1).

"Rights of common, rights of sheepwalk, rights of way, watercourses, and rights of water, and other easements". That section was evidently found to be too narrowly drawn and a number of additional items were added by the Land Transfer Act 1897. The statutes were consolidated in 1925 (without, it appears, any attempt at rationalisation) by throwing four of the 1897 additions into the middle of the 1875 easements paragraph; and the reference to equitable easements was then tacked on to the end. In those circumstances, in construing the paragraph it cannot safely be assumed that the items are mutually exclusive: indeed, it would seem they are not.

36. Our general comment is that it might be helpful to split up the items: easements and profits could be in one paragraph and public rights in another. It is, however, necessary to consider each class of right and this we do below.

"Rights of common"
"Profits à prendre"
"Rights of sheepwalk"

37. These items may conveniently be considered together. A profit à prendre is a right to enter another's land and take therefrom part of the land (e.g. sand, gravel or minerals) or its natural produce (e.g. grass, wood, turf or fish). There is no doubt but that legal profits à prendre must continue to be overriding interests (unless they are protected by an entry on the register). Whether equitable profits are within the paragraph at all is perhaps a moot point; they are seldom encountered, and as we have already suggested,[50] we think it should be made plain that such minor interests are protectable by notice on the register and should on that account not be overriding interests.

38. Since, in this context, all rights of common are profits à prendre, we suggest that separate reference to them might be eliminated. It is worth noting that under the Commons

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50. In para. 20 above.

Registration Act 1965, the continuing enforceability of almost[51] all rights of common and some sole profits à prendre depends on their registration under either that Act or the (Land Registration) Act. In the latter case they are by definition not overriding interests; and in the former, although they are overriding interests, they are readily ascertainable without reference to the documentary title.

"Rights of Sheepwalk"

39. A sheepwalk is an expression which seems to be more apt to describe the land over which the right to pasture sheep exists - the actual right being formerly called the right of foldcourse.[52] Whatever may be the correct description of the rights referred to under this heading in paragraph (a), it is clear that what is intended is a reference to the right to pasture sheep. Again, such a right is a profit à prendre (it may be either a sole right or a right of common) and if profits à prendre are specifically mentioned as a head of overriding interest it seems unnecessary to refer to this particular form of profit. We suggest that the reference to rights of sheepwalk could be deleted.

"Drainage rights"

40. Drainage rights will, in many cases, constitute positive easements. How far other types of drainage rights are intended to be covered by the expression is uncertain. The term public rights used later in the paragraph would seem to cover public rights of drainage and it is for consideration whether anything would be lost by removing from the paragraph the specific reference to drainage rights.

"Customary rights (until extinguished)"

41. It is not entirely clear what rights are intended to be included in the expression "customary rights". The reference to extinguishment seems to indicate that the words relate to

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51. The Minister had a limited power of exemption under s.11 of that Act.

52. See Robinson v. Duleep Singh (1879) 11 Ch.798.

rights which have now gone but which were temporarily preserved under the 1925 property legislation on the abolition of copyhold tenure. This construction is clearly supported by the contexts of the other references to extinguishment in section 70(1); and by the fact that copyhold tenure was sometimes known as "customary" tenure.[53] Another view has, however, been expressed that the rights "should be taken at least to include those rights arising from custom which enure for the benefit of the inhabitants of a locality",[54] but reference to extinguishment seems to make such a view difficult to maintain. Whichever view is correct it seems that the expression ought to cover those rights which arise under custom for the benefit of inhabitants of a locality.[55] Possibly such rights would be covered by the expression "public rights" which appears next in the list of rights in paragraph (a). If so, retention of the specific reference to customary rights may be unnecessary; but if the reference is retained, it might be preferable to call them "rights arising under custom".

"Public rights"

42. Here again there is uncertainty as to the meaning or extent of the expression "public rights" in this context, although we doubt whether there is any need to try to define the expression. Indeed, its vagueness may be an advantage. It may include rights of the inhabitants of a parish under an inclosure award to hold an annual fair or wake on a particular piece of land.[56]

"Rights of way"

43. Rights of way may be public or private. If they are public they would, presumably, be covered by the expression

53. See e.g. the heading to Part V of the Law of Property Act 1922.

54. Key and Elphinstone's Precedents in Conveyancing 15th ed. vol.3. at 47.

55. Such rights may not qualify as easements or profits à prendre.

56. cf. Wyld v. Silver [1963] Ch.243.

"public rights" used earlier in the paragraph. If they are private they will either constitute easements (and thus be covered by the general reference to easements at the end of the paragraph) or be enjoyed by custom. It is suggested that there is no need to mention rights of way as a separate head of overriding interest.

"Watercourses"

44. In the context of paragraph (a) it seems probable that the expression "watercourse" means an easement or right to the running of water rather than the actual stream or channel which carries the water.[57] It seems unnecessary, therefore, specifically to mention the expression if easements are mentioned in the paragraph.

"Rights of water"

45. Rights of water can be of many kinds. They include the right to water cattle, the right to take water for domestic purposes, the right to draw water from a spring or a pump or to use the water of a natural stream, the right to send water across land by means of an artificial watercourse and the right to discharge rainwater. It would, we think, be impracticable to require these matters to be referred to on the register (unless they are expressly created easements) and it is therefore necessary to retain this head. But we do suggest that the head should expressly exclude rights of water which constitute easements (and so fall within the next head unless in any particular case they are required to be entered on the register).

"Other easements not being equitable easements required to be protected by notice on the register"

46. The reference to "other" easements presumably includes all types of easement including negative easements, such as rights of support and light, although no reference is made to

57. For a discussion as to the possible meanings of the expression "watercourse", see Taylor v. Corporation of St. Helens (1877) 6 Ch.D. 264 per Jessel M.R. at 271.

any negative easement earlier in the paragraph. The words "not being equitable easements required to be protected on the register" have been a source of controversy and doubts have been expressed as to whether equitable easements are or are not overriding interests within the meaning of the paragraph. As we have already said, we think that such rights should not be overriding interests but should be capable of being protected on the register.

A possible reclassification

47. In view of the foregoing comments we suggest that it might be possible to reclassify the rights referred to in paragraph (a) so that they would consist of the following:-

(i) Public rights
(ii) Rights arising under custom
(iii) Rights of water, not being easements
(iv) Easements and profits à prendre other than:-
  (a) Equitable easements and equitable profits
  (b) Those expressly granted or reserved out of registered land and whose creation requires to be completed by registration and also noting on the register of the title of the servient land.

Rule 258

48. The consideration of easements and other rights attaching to land in the context of overriding interests must necessarily include consideration of rule 258. The sidenote reads "Adverse easements treated as overriding interests" and the rule provides that the following matters shall be overriding interests within section 70 of the Act:-

> "Rights, privileges, and appurtenances appertaining or reputed to appertain to land or demised, occupied, or enjoyed therewith or reputed or known as part or parcel of or appurtenant thereto, which adversely affect registered land ..."

Under various provisions of the Act and Rules,[58] the registration

58. r. 251, ss. 5-7, 9-11, 19(3), 20(1), 22(3) and 23(1).

of a person as the proprietor of a freehold or leasehold estate whether on a first registration or following a disposition of registered land vests in that person the same rights as he would have obtained under the "general words" implied in a conveyance or assignment of unregistered land. Those rights are deemed to be included in a conveyance or assignment of land by virtue of section 62 of the Law of Property Act 1925[59] and they include matters of the nature of those referred to in rule 258. As registration confers on the registered proprietor rights, privileges and appurtenances so there must be a corresponding detriment to the owner of the land adversely affected. The purpose of rule 258 is to ensure that where, as the result of the registration of a person as proprietor of land, the benefit of rights vests in him under section 62, the burden of those rights, if affecting other registered land, should in any event be overriding interests. Thus if A sells part of his registered freehold property to B, the registration of B as proprietor of the part may vest[60] in B the benefit of some unspecified "right" previously enjoyed over the land retained by A. The register of A's title after the sale will contain no reference to this right, and were it not for the fact that rule 258 makes the right an overriding interest burdening A's land, a purchaser from A would take free from it.

49. Since section 70(1) of the Act contains what might be assumed to have been a comprehensive list of the matters which, when the Act came into force, were overriding interests, it is perhaps surprising that matters should have been declared to be overriding interests by subordinate legislation. The Rules contain a number of provisions which might well have been contained in the Act and vice-versa. It is suggested that consideration should be given to listing all overriding interests in the same provision and for the text of that

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59. The section applies only if a contrary intention is not expressed in the conveyance and has effect subject to any contrary provision in the conveyance. (Law of Property Act 1925, s.62(4)).

60. Under r.251.

provision to be appropriately amended on each occasion that the list is added to or varied by subsequent legislation.

Paragraph (b)

> "Liability to repair highways by reason of tenure, quit-rents, crown rents, heriots, and other rents and charges (until extinguished) having their origin in tenure."

"Liability to repair highways by reason of tenure"

50. Such a liability, which at the present time is no doubt rare, is a charge imposed on the land and the obligation runs with the land and every part of it. At common law, the charge was ultimately thrown upon the owner, though, primarily, the occupier might have been the person chargeable.[61] Enforcement of the liability is now dealt with by sections 59-61 of the Highways Act 1959 and the liability may affect the owner of the leasehold interest as well as that of the freehold interest in the land. An individual or a corporate body may be liable to repair a highway, either under a special enactment or by reason of tenure, enclosure or prescription. Only a liability by reason of tenure is covered under this head of overriding interest. It has its origins in the terms of the feudal grant of the lands in question and its existence is prima facie established in the same way as a liability by prescription at common law, namely, by showing that the landowner and his predecessors have for a great length of time actually repaired the highway. It seems necessary to retain this liability as an overriding interest.[62]

"quit-rents, crown rents, heriots and other rents and charges (until extinguished) having their origin in tenure"

51. With the possible exception of crown rents, these liabilities were manorial incidents which were preserved for

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61. The Queen v. Bucknell (1702) (7 Mod. 54 and 98; and the cases there cited) quoted with approval by Lord Denman C.J. in Baker v. Greenhill (1842) 3 Q.B. 148 at 162.

62. For a fuller discussion of the nature of this liability see Pratt and Mackenzie's Law of Highways 21st ed., 76.

a limited time following the enfranchisement on 1 January 1926 of copyhold and other forms of tenure,[63] but which have now been extinguished.[64] Presumably they need no longer be listed as overriding interests. The parts of the Law of Property Act 1922[65] which dealt with manorial incidents did not in terms mention "crown rents", and there is therefore a possibility that the crown rents referred to here were not manorial incidents and have not disappeared. On the other hand, having regard to the context, it would seem much more likely that the crown rents referred to were manorial incidents and have disappeared accordingly, since the 1922 provisions bound the Crown.[66] We are inclined to think that the latter is the better view and that it would therefore now be safe to eliminate the whole of this part of paragraph (b). We would, however, welcome any information as to any subsisting crown rents which might be thought to fall within the terms of the paragraph.

Paragraph (c)

"Liability to repair the chancel of any church"

52. Liability for chancel repairs is an extremely complicated and in some respects, obscure topic.[67] Although the liability may not be often encountered, its existence may not always come to light on a purchase of the land which it affects. If a satisfactory means could be devised for making the liability registrable - possibly in the register of local land charges - this would clearly assist purchasers. Whether registration is practicable or not both as regards registered and unregistered land is a matter which we are investigating[68] and cannot

63. Law of Property Act 1922, s.128.

64. Law of Property Act 1922, s.138(1) and s.140. Postponement of Enactments (Miscellaneous Provisions) Act 1939 s.3; Postponement of Enactments (Miscellaneous Provisions) Act 1939 (Manorial Incidents Extinguishment) Order 1949 S.I. 1949 No.836.

65. Parts V and VI.

66. Law of Property Act 1922, ss. 134 and 141.

67. A pamphlet "Liability for Chancel Repairs" is issued by the Board of Inland Revenue No.1724 (1971). A study of the pamphlet will indicate some of the complexities.

68. See our Fifth Annual Report (Law Com. No.36) para. 28.

conveniently be discussed in this Paper. It is clear that until any amending legislation is passed, such a liability must remain as an overriding interest. Where the existence of the liability is disclosed on the abstract of title at the time of first registration, it is the practice of the Registry to note it on the register of the title.

Paragraph (d)

> "Liability in respect of embankments, and sea and river walls"

53. Subsisting liabilities in respect of embankments, and sea and river walls were not affected by the enfranchisement of copyhold and some other forms of tenure under the 1925 property legislation.[69] Furthermore a riparian owner may be liable for the repair of river walls.[70] The establishment of drainage authorities under the Land Drainage Act 1930 did not release any person from any liability to which he was subject before the passing of that Act by reason of tenure, custom, prescription or otherwise.[71] The retention of this liability as a head of overriding interest seems to be unavoidable.

Paragraph (e)

> "Land tax, tithe rentcharge, payments in lieu of tithe and charges or annuities payable for the redemption of tithe rentcharges"

54. Land tax was abolished by section 68 of the Finance Act 1963. Tithe rentcharge was extinguished by the Tithe Act 1936 and replaced by tithe redemption annuities. These are payable for sixty years from the 2nd October 1936 and will thus disappear after 1996. Tithe redemption annuities are overriding interests by virtue of section 13(11) of the Tithe Act 1936. There are, however, various matters which can still subsist as payments in lieu of tithe and charges or annuities

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69. Law of Property Act 1922, 12th Sched. para. (6).

70. See Nitro-Phosphate Company v. London & St. Katherine Docks Co. (1878) 9 Ch.D 503.(C.A.)

71. Land Drainage Act 1930 s.36.

payable for the redemption of tithe rentcharges. Examples of these are payments in lieu of tithes of fishing, and corn rents.[72] It seems necessary, therefore, to retain this head of overriding interest, subject to the omission of those matters which can no longer subsist (i.e. by deleting the words "Land tax, tithe rentcharge").

Paragraph (f)

> "Subject to the provisions of this Act, rights acquired or in the course of being acquired under the Limitation Acts".

55. In some jurisdictions, particularly those in which the Torrens system[73] operates, it is not possible to acquire by adverse possession rights in respect of land with a registered title. The reason for this is that in those jurisdictions a registered title is said to be "indefeasible" in the sense that the register cannot generally be rectified against a registered proprietor. It is, therefore, considered inconsistent with the concept of an indefeasible title that rights potentially adverse to that title can in any circumstances prevail against it. In England and Wales, however, registered titles are not indefeasible, since in a wide variety of circumstances power exists to rectify the register against the registered proprietor.[74] Whether or not, under the general law, rights should be capable of arising by adverse possession is a matter which is outside the scope of this Paper. So long, however, as rights can be acquired to unregistered land by adverse possession the land registration system must provide for that contingency in relation to registered land.[75] This paragraph

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72. See Tithe Act 1936, s.30(2) and Corn Rents Act 1963.

73. The Torrens system is a system of registration of title to land which is established in many parts of the Commonwealth and in some of the American States. It is so named after Sir Robert Torrens who was largely responsible for its adoption in South Australia in 1858.

74. Under s.82.

75. See s.75.

gives effect to that principle by preserving the rights of an adverse possessor as an overriding interest.[76]

Paragraph (g)

> "The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such persons and the rights are not disclosed."

56. In relation to unregistered land, it has long been the law that a purchaser is deemed to have notice of the rights of persons who are in actual occupation of the land. This is sometimes referred to as the Hunt v. Luck[77] principle after the well-known case of that name in which it was discussed. In that case, Farwell J., in a passage approved by the Court of Appeal,[78] stated the principle as follows:-

> "(1) A tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights;
>
> (2) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights."

57. In amplification of the first limb of the principle Vaughan Williams L.J. in the same case said:-

> "... if a purchaser or mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make enquiries of the person in possession - of the tenant who is in possession - and find out from him what his rights are, and, if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or rights of the tenant in possession." [79]

58. A purchaser was bound only to make such enquiries as were reasonable. Section 3 of the Conveyancing Act 1882 (now

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76. A registered purchaser for value is in no better position than his predecessor in title and takes subject to the rights of any adverse possessor (Bridges v. Mees [1957] Ch.475). Where the register is rectified by removing from a registered title land to which title has been acquired by adverse possession, the registered proprietor is not entitled to indemnity because he suffers no loss by the rectification (Re Chowood's Registered Land [1933] Ch.574). Any person claiming to have acquired a title under the Limitation Acts to a registered estate in land may apply to be registered as proprietor (s.75(2)).

77. [1902] 1 Ch.428.

78. Ibid. at 432.

79. Ibid. at 433.

substantially re-enacted in section 199 of the Law of Property Act 1925) provided, in effect, that a purchaser would not, in relation to matters outside his own knowledge, be prejudicially affected by notice of anything unless it would have come to his knowledge "if such enquiries and inspections had been made as ought reasonably to have been made by him". As to the enquiries which ought reasonably to be made by a purchaser, Cozens-Hardy L.J. in Hunt v. Luck said:-[80]

> "I cannot bring myself to hold that an enquiry ought reasonably to have been made which is not usual, which has not so far as we are aware ever been recommended by any text-book writer, and which has not even been suggested by any judge except in that one passage in the judgment of Jessel M.R. in Mumford v. Stohwasser." [81]

It is, however, a matter of some doubt whether the limitation on the nature of the enquiries which the purchaser is expected to make extends to the preliminary question as to the persons of whom enquiries should be made. On one view, reasonable enquiries as to their rights need only be made of those persons whom the purchaser (after reasonable enquiry and inspection) should have reason to believe to be in occupation of the property; but the recent decision of the Court of Appeal in Hodgson v. Marks[82] suggests that, however difficult it may be for a purchaser to discover that a particular individual is in occupation of the property, if that person is in fact in occupation, the purchaser ignores him at his peril.

59. Although the rights of occupiers have, in principle, been preserved by the 1925 property legislation,[83] one of its features was to make, in relation to unregistered land, registration at the Land Charges Registry the only method of

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80. Ibid. at 435.

81. (1874) L.R. 18 Eq. 556 at 562. The passage was disapproved by the Court of Appeal in Hunt v. Luck (supra,) at 433.

82. [1971] 2 W.L.R. 1263. The case is discussed further in paras. 60 and 69 below.

83. See Law of Property Act 1925, s.14.

giving a purchaser notice of those (mostly equitable) rights which are made registrable as land charges under the Land Charges Act 1925. Thus a purchaser of unregistered land will not be deemed to have notice of any such right if it is not registered at the Land Charges Registry before the completion of his purchase.[84] It is irrelevant that the purchaser has actual notice of the right or could have discovered it from enquiry of an occupier. To that extent therefore the Hunt v. Luck principle has been entirely abrogated in relation to any right which is registrable as a land charge.

60. In relation to registered land, however, paragraph (g) of section 70(1) protects rights of occupiers notwithstanding that they are capable of being protected by an appropriate entry on the register. This presents a striking contrast to the position in relation to unregistered land where, as we have explained, matters which are registrable as land charges do not bind a purchaser unless they are protected by an entry in the Land Charges register. Moreover, paragraph (g) seems in two respects to protect rights which would not necessarily have been protected under the Hunt v. Luck principle. First, the paragraph gives protection generally to rights of persons in receipt of the rents and profits of the land, whether or not there is anybody in occupation of the land. Secondly, on a literal interpretation of the paragraph, all rights of the occupier appear to be protected, whether or not they could reasonably have been discovered, and it may be that the paragraph can only be so construed.[85] The decision of the Court of Appeal in Hodgson v. Marks, to which we have already referred, does not seem to throw any light on this matter, since it turned not on the adequacy of the enquiries made of the occupier (none was in fact made) but on whether the plaintiff was an occupier at all for the purposes of the paragraph. That case does, therefore, emphasise the need for

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84. Land Charges Act 1925, s.13; (as amended). The section does not apply to certain land charges created before the Land Charges Act came into force.

85. See Emmet on Title 15th ed. 200.

the most careful enquiry by a prospective purchaser or mortgagee of any land as to whether or not there is any person in occupation of that land. A purchaser or mortgagee may perhaps find himself bound by rights which he could not have ascertained or which he could only have ascertained as the result of enquiries which any reasonable person might be reluctant to make.

61. We have already suggested in paragraph 20 above that the "rights" protected under paragraph (g) should exclude certain matters which can be protected on the register by an appropriate entry. In addition, for the reasons given in paragraph 14 above, we do not consider that the paragraph should protect any interest which is capable of substantive registration.

62. There are, moreover, certain rights which are not only protected under paragraph (g) when coupled with actual occupation but are also protected under some other head of overriding interest. Into this category fall leases or tenancies for terms of 21 years or less[86] and rights acquired or in the course of acquisition under the Limitation Acts.[87] It seems unnecessary, therefore, that these matters should be protected under paragraph (g) as occupiers' rights when they are protected elsewhere.

63. We have mentioned in paragraph 60 above that the rights protected under paragraph (g) include those of a person in receipt of the rents and profits of the land. Protection is thus given to those rights whether or not they can be ascertained by inspection of the land or enquiry of the occupier. To that extent the paragraph goes much further, in protecting the rights of persons in receipt of the rents and profits of land, than the second limb of the Hunt v. Luck principle as enunciated by Farwell J.[88] We question, however,

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86. Under para. (k).

87. Under para. (f).

88. See para. 56 above.

whether it is necessary for the rights of such a person to be protected under the paragraph at all. If he is the freeholder or a person holding under a registrable lease or a lease which is capable of protection on the register,[89] his rights require no additional protection. If he holds under a lease for 21 years or less granted at a rent without taking a fine,[89] his rights are protected as an overriding interest. We think, therefore, that the rights of a person in receipt of the rents and profits of registered land should be altogether excluded from paragraph (g).

64. If, as we suggest, the rights referred to in paragraph (g) were to be cut down by excluding the matters mentioned in paragraphs 61, 62 and 63 the scope of paragraph (g) would be reduced. The question, therefore, is whether it could be repealed altogether.

65. For many years it was uncertain what was the precise nature of the "rights" to which the paragraph applied. In the following passage from the dissenting judgment of Russell L.J. in National Provincial Bank Ltd. v. Hastings Car Mart Ltd.,[90] the position was explained as follows:-

> "It seems to me that section 70 in all its parts is dealing with rights in reference to land which have the quality of enduring through different ownerships of the land, according to the normal conceptions of title to real property."

This view was approved by the House of Lords[91] and it is now settled that mere personal rights of an occupier, such as the common law right of a deserted wife to remain in the matrimonial

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89. In Part B of our first Working Paper on Land Registration, we suggest that leases of registered land should be either registrable or overriding. If that suggestion were to be implemented, there would no longer be an intermediate class of lease capable of protection on the register but neither registrable nor overriding.

90. [1964] Ch.665 at 696.

91. [1965] A.C. 1175.

home,[92] do not constitute overriding interests under paragraph (g). Whether or not the rights of a beneficiary under a trust for sale in occupation of registered land (for example, the equitable interest of a wife[93] or other person[94] who has contributed to the purchase of a home) could fall within the paragraph has not, so far as we are aware, been decided. As a matter of principle, however, it is suggested that such rights, being minor interests capable of being overridden on a sale for value of the land[95] should not become overriding interests because beneficiaries happen to be in occupation. It is expressly provided in the Act (subject to the provisions relating to settled land) that neither the Registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust express, implied or constructive and that references to trusts shall, so far as possible, be excluded from the register.[96] In regard to interests under a strict settlement these take effect as minor interests and not otherwise.[97]

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92. This right has now for practical purposes been superseded by the statutory occupation right under the Matrimonial Homes Act 1967 which is a registrable charge and is expressly not an overriding interest. (Matrimonial Homes Act 1967 s.2(7)).

93. See Emmet on Title 15th ed. 203, 204. (1969) 33 Conv. (N.S.) 254 (Hayton). In relation to unregistered land where a wife has contributed to the purchase of the matrimonial home which was conveyed to the husband alone, it has been held that her presence on the property does not give to a mortgagee notice of her equitable interest. (Caunce v. Caunce [1969] 1 W.L.R. 286). As part of our study of the law relating to Family Property we are considering the rights which a spouse should have in relation to the ownership of the matrimonial home and the protection of those rights.

94. In Bull v. Bull [1955] 1 Q.B. 234 the dispute was between the contributing parties (a mother and son) and did not involve a purchaser.

95. s. 3(xv). The beneficiary's interest would attach to the proceeds of sale.

96. s.74. The entry of a restriction on the register under s.58 would effectively prevent a sole trustee from dealing with the land.

97. s.86(2).

66. What other rights of occupiers can fall within the paragraph? Four classes which seem to be within its ambit require consideration. These are the rights of a person entitled to be registered as a transferee or lessee before he is actually registered; the occupying vendor's lien on the land for unpaid purchase money; the rights of a person in occupation who has a good title in equity against the registered proprietor; and the rights of certain licencees. We will deal with each of these individually.

67. The position of a person who is applying to be registered as a proprietor on a transfer for value has to be considered separately from that of a person who is applying to be registered on the grant of a lease. The former is entitled as of right to be provided with an authority to inspect the register[98] and, armed with this, he can obtain an official search of the register which gives him priority if he lodges his documents within the prescribed time. It does not seem necessary, therefore, to give a purchaser special protection for his rights by virtue of his being in actual occupation of the land between the date of completion of his purchase and the date of registration. A person who is taking a lease of registered land is not, however, entitled to an authority to inspect the register of his lessor's title[99] and can only obtain such an authority if his lessor consents. In those cases where the lessor does furnish an authority the lessee can obtain similar protection to that of a purchaser,[100] but where the lessee cannot obtain an authority the official search procedure is not available to him. If, however, he goes into actual occupation of his leasehold premises immediately after taking his lease he is protected under paragraph (g). If special protection is required for a lessee between the date of his lease and the date of its registration we do not think

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98. s.110(1).

99. Ibid.

100. Land Registration (Official Searches) Rules. S.I. 1969, No.1179.

this should depend either on the ability of the lessee to induce his lessor to furnish him with an authority to inspect the register or on the fact that the lessee has gone into actual occupation of the land. In our first Working Paper on Land Registration[101] we suggested that anybody should be entitled, on payment of a fee, to obtain an office copy of the entries in the register of a title.[102] If that suggestion were to be implemented any prospective lessee would be able to obtain an official search in the same way as a prospective purchaser and thus be able to obtain priority for his lease.

68. It seems to us reasonably clear that an unpaid vendor's lien is a right which (if the vendor were in occupation at the relevant time) could constitute an overriding interest within paragraph (g).[103] Nevertheless, in our view, such a right, if it relates to registered land, ought not to affect subsequent purchasers (or mortgagees) of the land unless it is protected by some entry on the register. The purchaser can have become registered as the proprietor only because the unpaid vendor has handed over the land certificate and an executed transfer. In such circumstances, the unpaid vendor has merely himself to blame if he is postponed to a third party dealing with the purchaser in ignorance of the lien.

69. As a recent case demonstrates, a right to the fee simple in equity may be an overriding interest under paragraph (g), if coupled with occupation. In Hodgson v. Marks,[104] the plaintiff (an elderly lady) had transferred the registered title to her house to her lodger, but she continued to live there as before. The lodger held the property as bare trustee for her but sold it to the defendant Marks, who became the registered proprietor.

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101. Para. 89.

102. Certain financial matters (e.g., prices and rents) would either be excluded from the register or be "masked out" of the office copy supplied.

103. London & Cheshire Insurance Co,Ltd., v. Laplagrene Property Co. Ltd., [1971] 2 W.L.R. 257.

104. [1971] 2 W.L.R. 1263.

The Court of Appeal (overruling Ungoed-Thomas J.) held that Marks should have discovered the plaintiff's rights by enquiry, and ordered the rectification of the register in the plaintiff's favour. While we do not wish to suggest that that particular case was decided otherwise than in accordance with the merits, we think that it is unsatisfactory that the law should require cases of that sort, involving two innocent parties, to be decided on a basis which can only result in total failure for one side or the other.[105] Mrs Hodgson had not taken any steps to protect her beneficial interest on the register and had she failed to establish that she was "in occupation" when Marks became the registered proprietor (as, indeed, she did at first instance) she would have lost her home; as it was, she was held to have had an overriding interest, so that the defendant Marks and his mortgagee were deprived of all rights in relation to the house. It will be borne in mind that rectification of the register to give effect to an overriding interest does not entitle the proprietor against whom it is made to compensation under section 83.[106] It seems to us that cases of this class could be more satisfactorily dealt with if the Court had wider powers in the field of rectification and indemnity, and we propose to consider that part of the Land Registration law in a later Working Paper. For present purposes, we assume that we will, in that Paper, make a suggestion which would enable cases like Hodgson v. Marks to be dealt with in a more flexible manner; and on that footing it would not seem necessary that the rights of a person in Mrs Hodgson's position should constitute an overriding interest.

70. As we have mentioned in paragraph 65 above, mere personal licences are not within paragraph (g) at all, but there may, it seems, be other licences which create the type of right described by Russell L.J. in the passage we have quoted. Indeed, he himself said in the same case:-[107]

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105. Subject to any remedy that either may have against the third party.

106. Re Chowood's Registered Land [1933] Ch.574. Re Boyle's Claim [1961] 1 W.L.R. 339.

107. [1964] Ch.665 at 699.

> "In the case of contractual licences, their elevation for the purposes of title to a status equivalent to an estate or interest in land might be thought desirable, at least in the case of licences to occupy ..."

In the House of Lords, the position of rights under licences which are not purely personal was, however, left open.[108]

71. A person who is in occupation of property by virtue of a contract which is neither registrable nor capable of being protected on the register, should not, we think, lose his right to occupy the property merely because the interest of the freeholder or other person who granted the right to occupy is sold. The proprietor may, for example, have contracted to allow an employee or ex-employee to occupy a cottage for a definite period or subject to notice, under an arrangement which does not constitute a tenancy. If the occupation is apparent from an inspection of the property then, whether or not such a permission amounts to an interest in land, we think that a purchaser should be bound to honour the arrangement (whatever the position may be between himself and his vendor). Protection should, we suggest, only be given to the right of occupation itself and not to collateral rights. As to what is to constitute actual occupation, this should be decided on the facts of each particular case,[109] but we do not think that any right should constitute an overriding interest under paragraph (g) unless the occupation is such that it is apparent from reasonable enquiry or inspection of the property by the purchaser or mortgagee.[110]

72. It has been suggested that tenants holding over under the Rent Acts may have their rights protected under paragraph (g) as persons in occupation of the land.[111] Whether or not

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108. See e.g. [1965] A.C. 1175 Lord Wilberforce at 1251.

109. cf. Hodgson v. Marks [1971] 2 W.L.R. 1263 at 1268.

110. cf. Law of Property Act 1925, s.199.

111. Curtis and Ruoff, Registered Conveyancing 2nd ed. 122 Emmet on Title, 15th ed. 201 National Provincial Bank Ltd. v. Hastings Car Mart Ltd. [1964] Ch.665 per Lord Denning at 689.

that view is correct, it seems to us that rights to remain in occupation of property that are expressly granted by statute should not be protected under the head of occupiers' rights (i.e. under paragraph (g)) but ought (if their protection requires them to be overriding interests) to be protected under a specific head of overriding interest by being so described in the statute which creates the right.[112] When a new head of overriding interest is created, section 70(1) (or any provision replacing it) should, as we have already suggested,[113] be textually amended to include a reference to it.

73. Our view at present is that the existing paragraph (g) might be replaced by a new one on the lines set out below. In considering this, it should be borne in mind that, if our proposals made elsewhere in this Paper are adopted, the paragraph would have to be read subject to a provision applicable to all the paragraphs of section 70(1) that no right which is registrable or which is required to be protected on the register so as to bind a purchaser could constitute an overriding interest. Any such right would thus be excluded from the operation of the new paragraph which we suggest might read as follows:-

> "(g) Contractual rights to occupy the land or any part thereof of every person who at the date of the relevant disposition is in actual and apparent occupation of the land save where enquiry is made of such person and such rights are not disclosed."

In the next following paragraphs we propose to analyse in detail the wording of the amended paragraph.

"Contractual rights to occupy the land or any part thereof"

74. We have in mind that only rights of occupation arising under contract including (if the other conditions of the

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112. cf. Leasehold Property (Temporary Provisions) Act 1951, s.2(4)
113. See para. 49 above.

paragraph are satisfied) the contractual rights of a lodger or person sharing accommodation should be protected, but not, for example, the rights of occupation of the matrimonial home which arise by operation of law. Only rights of occupation would be protected, not collateral rights.

> "of every person who at the date of the relevant disposition is in actual and apparent occupation of the land"

75. Under section 3(xvi) of the Act an overriding interest is, among other things, an interest subject to which a registered disposition is to take effect. Our reference to "relevant disposition" is to the disposition in question; for example, the transfer which is to take effect subject to the contractual rights of occupation of a particular person. The significance of the date of the disposition, as opposed to the date of its registration, is to ensure that it is the rights of the occupier at the date of completion - in the sense in which that expression is used by conveyancers - that are relevant.[114] By including a reference to "apparent", we wish to convey the sense that the occupation must be apparent from such enquiries and inspections as ought reasonably to have been made by a purchaser in the circumstances of each particular case.

> "save where enquiry is made of such person and such rights are not disclosed"

76. These words follow the wording of the existing paragraph. A purchaser should not be bound by an occupier's rights if, on enquiry, the occupier does not disclose them.

77. If paragraph (g) were to be recast on the lines we have suggested, we think that there should be a consequential amendment in the provisions relating to indemnity on rectification.[115] This is not the place to deal with the point

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114. cf. Re Boyle's Claim [1961] 1 W.L.R. 339 where it was held that under the existing paragraph (g) the relevant date was the date of registration.

115. s.83.

in detail but a short illustration will suffice to indicate what we mean.[116] A strip of land is included in A's registered title, but the registration was erroneous because the strip actually belonged to A's neighbour B. B obtains rectification of the register and the further question (which does not affect B) arises as to whether A is entitled to indemnity out of the Insurance Fund.[117] The answer is 'No' if B had been in actual occupation of the strip when A's title was registered.[118] We are inclined to think that that is a proper result in relation to a claim on the Fund because A has not been deprived by the rectification of anything of which he was in actual enjoyment; but the answer is technically founded on the fact that A took subject to B's overriding interest (his right coupled with actual occupation). If that right were to cease to be an overriding interest it would be necessary, if the indemnity consequences to A are not to be altered, to include in section 83 an express reference to adverse occupation as a bar to indemnity. It does not seem necessary to preserve paragraph (g) in its existing form simply to achieve the same result.

Paragraph (h)

> "In the case of a possessory, qualified or good leasehold title, all estates, rights, interests and powers excepted from the effects of registration."

78. Registration of a title with less than an absolute title does not prejudice certain interests.[119] Because of the nature of a possessory title, it is necessary that interests subsisting at the time of first registration which are adverse to or in derogation of the title should not be prejudiced. Qualified titles are extremely rare. They can be granted where titles are subject to defects which are referred to on the

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116. See In re Boyle's Claim [1961] 1 W.L.R. 339.

117. See cl.1 of the Land Registration and Land Charges Bill at present before Parliament.

118. The converse is not necessarily true.

119. See ss. 6 and 11 (possessory titles), ss. 7 and 12 (qualified titles) and s.10 (good leasehold titles).

register. This is done by means of an entry which excludes from the effect of registration some specified estate, right or interest. A good leasehold title is granted without investigation of the reversionary title or titles and accordingly registration with good leasehold title does not prejudice the enforcement of the interests affecting or in derogation of the title of the lessor to grant the lease. In relation to all these titles this head of overriding interest ceases to apply if and when they are converted to absolute titles.[120] It is necessary that paragraph (h) should be retained.

Paragraph (i)

> "Rights under local land charges unless and until registered or protected on the register in the prescribed manner."

79. Local land charges are, broadly speaking, charges or matters of a local or public nature affecting land which are registrable in registers of local land charges. The registers are kept by local authorities under the provisions of the Land Charges Act 1925, and the system operates in the same manner as regards both registered and unregistered land. Although the rights under a local land charge which affects registered land can be protected by notice[121] on the register of title at the Land Registry this is not usually done. A local land charge to secure money must, however, be registered at the Land Registry as a charge before it can be enforced against registered land.[122]

80. Since it is unusual for the rights under local land charges to be "registered or protected" at the Land Registry, it is essential that such rights, if they are not so registered or protected, should constitute overriding interests; otherwise a proprietor of a registered title would take free from

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120. See s.77.

121. s. 49(1)(c) and r.190.

122. s. 59(2) proviso.

an interest in the land arising under a local land charge which was not protected by an entry in the register of his title. The paragraph seems to be correct in principle.

81. The apparent simplicity of the paragraph is, however, deceptive because it is not clear what are the local land charges to which it refers. It should include all matters which fall to be registered in registers of local land charges; but this may not be the case. For the purposes of the Act, the expression "Local land charge" has the same meaning as in the Land Charges Act 1925 and in that Act it means the charges in favour of local authorities arising under certain specified legislation.[123] Many other matters, however, have by subsequent legislation[124] been made registrable in the local land charges registers and because of the various forms of wording which have been used in such legislation it is not always the case that such a matter actually constitutes a "Local land charge" as described in section 15(1) of the Land Charges Act. They may not therefore be local land charges within the ambit of paragraph (i). It is even possible that planning restrictions which are made registrable in the local registers under section 15(7) of the Land Charges Act are not, strictly speaking, local land charges: for they are said to be registrable only "as if" they were local land charges.

82. In view of the doubts mentioned in the preceding paragraph as to what may or may not be included as local land charges within paragraph (i), we suggest that the paragraph should be amended so as to make it clear that the expression as used in the paragraph includes <u>any</u> matter registrable in a register of local land charges.

83. It is to be noted that under paragraph (i), rights under a local land charge are overriding interests whether or not the charge has been registered in the appropriate local land charges register. What those rights amount to in the

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123. Land Charges Act 1925 s.15(1).

124. Including Local Acts.

absence of registration of the charge depends on the terms of the statute under which the matter in question is registrable as a local land charge. In fact, the matters so registrable under the Land Charges Act itself are all subject to the provision in section 15(1) of that Act that unless the charge is registered in the local register before the completion of the purchase it is void as against a purchaser for value of the legal estate.[125] Where that provision of section 15(1) applies, the rights which constitute the overriding interest will be of no value against the new proprietor. Many other matters which have become registrable in registers of local land charges since 1925 are, however, enforceable against a purchaser whether or not they have been registered in a local register. If, as we suggest, it is made clear that these other matters are comprehended in the expression "local land charges" for the purposes of paragraph (i), it follows that rights under local land charges should be overriding interests whether or not registered in a local register even though, in some cases, the rights may be valueless.[126]

Paragraph (j)

> "Rights of fishing and sporting, seignorial and manorial rights of all descriptions (until extinguished), and franchises"

"Rights of fishing and sporting"

84. The fishing and sporting rights of the lord of a manor were unaffected by the enfranchisement of copyholds under the 1925 property legislation.[127] It is therefore logical that these rights together with other manorial rights which were treated in a similar way should constitute overriding interests. In contrast to "seignorial and manorial rights of all

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125. The position may be affected by the provisions relating to official searches.

126. The Law Commission are currently examining the effect of non-registration of local land charges as part of their separate study of that topic.

127. Law of Property Act 1922, 12th Sched. para. (5).

descriptions (until extinguished)", which can only refer to rights which were associated with the old forms of tenure, the reference in paragraph (j) to fishing and sporting rights is not, in terms, limited to those which were so associated. It is arguable, therefore, that fishing and sporting rights of all kinds are overriding interests. If that interpretation is correct, we do not imagine that it can have been intended. In relation to rights of fishing in non-tidal waters, these, where separated from the ownership of the bed of the river, would normally constitute a profit à prendre (also covered by paragraph (a)) or be granted under a licence.[128] If granted under licence, it seems questionable whether in principle they should constitute overriding interests. Similarly, in relation to other sporting rights, these too, depending on the nature of the grant, might constitute a mere licence or a profit. It is suggested, therefore, that in paragraph (j) the reference to fishing and sporting rights should be qualified so that it covers only those which were saved from extinguishment under the 1925 property legislation.

"Seignorial and manorial rights of all descriptions (until extinguished)"

85. As well as the sporting rights of the lord, certain other manorial incidents were preserved for an indefinite period (until extinguished by agreement) under the legislation which enfranchised copyholds on 1 January 1926. All other manorial incidents have now ceased to exist. Those which may still remain are:-

(a) The lord's or tenant's rights to mines and minerals[129]

(b) The fairs, markets and sporting rights of the lord[129]

(c) The tenant's rights of common[130]

128. Fitzgerald v. Firbank [1897] 2 Ch.96.

129. Law of Property Act 1922, 12th Sched. para. (5).

130. Ibid. para. (4).

(d) The lord's or tenant's liability for the construction, maintenance, cleansing and repair of dykes, ditches, canals and other works.[131]

Where land has been enfranchised and the deeds or abstract of title show the rights of the lord which were saved, it is the practice of the Registry to repeat this information on the register when the title to the land comes to be registered.

"franchises"

86. A franchise is a right arising by grant from the Crown or by prescription which authorises something to be done such as the holding of a market or the operation of a ferry.[132]

Generally under paragraph (j)

87. Apart from the matters mentioned in paragraph 84 above in relation to rights of fishing and sporting, paragraph (j) does not seem to require amendment.

Paragraph (k)

"Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine"

88. In our first Working Paper on Land Registration we recommended that the words "granted at a rent without taking a fine" should be deleted from paragraph (k),[133] with the result that all leases or tenancies granted for a period not exceeding 21 years would constitute overriding interests whatever the terms on which they were granted. Such leases or tenancies would, moreover, be overriding interests whether the tenants were in occupation or not.

89. In commenting on the proposals contained in that Working Paper, several people have suggested that a lease which is not noted on the register ought not to be an overriding interest

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131. Ibid. para. (6).

132. Hammerton v. Dysart [1916] 1 A.C. 57.

133. Working Paper No.32, para. 46.

unless the tenant is in actual occupation. It is said that a purchaser should not be bound by a lease or tenancy which is neither noted on the register nor discoverable from inspection of the property. The effect of this suggestion, if implemented, would be to restore the law broadly to what it was under the Land Transfer Act 1875. The corresponding provision in that Act[134] constituted as "overriding interests"[135] leases and tenancies for any term not exceeding twenty-one years only "in cases where there is an occupation" under the lease or tenancy. Although, in principle, we entirely agree that the law should be so framed, we do not think that it could be rigidly applied to all leases and tenancies. Many short tenancies are informal and where they relate to dwelling-houses and flats, are often granted without the tenant being legally represented. We cannot think that it would be regarded as reasonable that a monthly tenant or even a tenant of a flat for say, three years, who has not yet moved in, would have to register notice of this tenancy against the reversionary title at the Land Registry to protect himself against a purchaser of the reversion. If the suggestion mentioned above were adopted it would mean that such a tenant who had not registered a notice could find that a purchaser of the reversion would take free of the tenancy, even if the purchaser in fact knew of it. There are bound to be differences of opinion as to where the line should be drawn between those leases or tenancies which are overriding interests and those which are not, and it is a question of holding the balance so far as possible between the interests of tenants on the one hand and those of purchasers on the other. Where there is a conflict we think that the law should incline in favour of the tenant. By not requiring occupation, the existing paragraph (k) does this and we agree with it. If the law were otherwise, the legal rights of a tenant who was not in occupation could be overreached by a transfer of his

134. s. 18(7).

135. The term "overriding interest" was not used in the 1875 Act.

landlord's estate and he would probably have no remedy of any kind; a purchaser, however, to whom the existence of an overriding tenancy has not been disclosed, may well have a remedy against his vendor. A further practical difficulty would arise under paragraph (k) if occupation were to be a precondition of the tenancy constituting an overriding interest. It is that if an occupying tenant were to sublet, the subtenancy, if coupled with occupation, would be protected as an overriding interest, whereas the tenancy itself would not be so protected.

90. In addition to leases or tenancies which take effect immediately, paragraph (k) covers those where the term commences in the future.[136] Thus a lease of registered land for a term of twenty-one years to commence in five years time would be an overriding interest (if granted at a rent without a premium). Since such a lease does not require to be noted on the register and there is unlikely to be anything ascertainable from an inspection of the property to show that it had been granted, a purchaser may find that he is bound by it although he was unaware of its existence. It is for consideration, therefore, whether a lease to take effect in the future should be an overriding interest.

91. The law relating to unregistered land draws no distinction here between immediate and future rights, but it does draw a clear line between a lease (or tenancy agreement) subsisting as a legal estate, and an agreement for a lease. The former binds a purchaser of the reversion whether he knows of it or not; the latter is an estate contract requiring, for its protection, registration at the Land Charges Registry. The law relating to registered land is essentially the same so far as terms not exceeding 21 years granted at a rent without premium are concerned; leases (and tenancy agreements) for such terms are overriding interests; agreements for leases are not overriding interests [137] but may be protected on the

136. Special considerations may apply to future terms extending (in effect) current terms: see r.47.

137. City Permanent Building Society v. Miller [1952] Ch.840.

register as land charges.[138] The question is whether this symmetry should be abandoned in relation to leases and tenancy agreements taking effect in the future, by providing that, for registered land only, such leases and tenancy agreements should be treated as if they were estate contracts.

92. Although that would restore the law as it stood between 1875 and 1926, we are of opinion that the existing parallels between the treatment of registered and unregistered land should, in the interests of simplicity, be preserved; and we do not think that a corresponding amendment should be made to the Land Charges Act making future leases of unregistered land registrable under that Act.

93. We are in any event not convinced that it would be right to make any such change in the law. As with short leases which take effect immediately, we fear that hardship could be caused to tenants if the law were to insist on registration for protection. We do not think, for example, that the law should provide, in effect, that the tenant under a lease for a term of say seven years to commence at the next quarter day could lose his rights under the lease merely because the landlord had sold the reversion before the term commenced. In such a case the tenant, if unrepresented, is unlikely to have taken any steps to protect his term. Furthermore, the purchaser may have been aware of the existence of the lease. The problem is again one of holding the balance, so far as possible, between the interests of tenants on the one hand and purchasers on the other. On the whole, our present view is that the law should, in relation to leases to take effect in the future, remain as it now is, but we would particularly welcome views on this point.

Paragraph (1)

"In respect of land registered before the commencement of this Act, rights to mines and minerals, and rights

138. s. 49(1)(c). But see para. 21 above, where we suggest that the rights under such agreements might in certain circumstances be overriding interests.

of entry, search and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals or of property in mines or minerals, being rights which, where the title was first registered before the 1st January 1898, were created before that date, and where the title was first registered after the 31st December 1897, were created before the date of first registration"

94. Paragraph (1) deals with rights to mines and minerals in respect of land registered before 1 January 1926. The reason why such rights were treated in different ways as overriding interests is that they were so treated in earlier legislation. Where land was registered in the years 1876 to 1897, all mineral rights created before 1898 are overriding interests. In relation to land registered after 1897 and before 1926 only mineral rights created before first registration are overriding interests.

95. The rights of the National Coal Board in respect of mines and minerals are overriding interests[139] as also are the mining and mineral rights of a lord of a manor.[140] Subject to these two important exceptions rights to mines and minerals created after 1925 are not overriding interests. A proprietor registered with an absolute title to a freehold estate obtains title to the land which, by definition, includes the mines and minerals.[141] After the title to the land has been registered, the mines and minerals can only be severed by means of a registered disposition.[142] If on first registration it appears to the Registrar from the abstract of title or otherwise, that all or any of the mines and minerals

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139. Coal Act 1938, s.41; Coal Industry Nationalisation Act 1946, ss. 5 and 8.

140. Under para. (j) of s.70(1). (See para. 85 above).

141. s. 20 and s. 3(viii) and (xiv).

142. s. 18(1)(a) and (e) (freeholds); s. 21(1)(a) and (d) (leaseholds).

are already severed, he is bound to enter a note in the Property Register of the appropriate title that such mines and minerals are excepted from the registration.[143] No alteration in paragraph (1) seems to be required.

PART C - MINOR INTERESTS INDEX

Introductory

96. As we have already mentioned[144] minor interests in general comprise all interests in registered land other than (i) interests capable of registration or protection on the register when so registered or protected, and (ii) overriding interests. The equitable interests of beneficiaries under trusts of land are an important class of minor interest[145] and it is only with such interests that we are concerned in this part of this Paper.

97. Equitable interests under trusts have, as a matter of general principle, no place on the register. The legal estate in any land held on trust is vested in the trustees and if the land is sold it is they who effect the conveyance or transfer.[146] The purchaser is not concerned with the equitable rights of the beneficiaries because those rights are overreached by the conveyance or transfer and attach instead to the purchase money. The Act accordingly provides that only legal estates are capable of registration,[147] and

> "... neither the registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust express implied or constructive, and references to trusts shall, so far as possible, be excluded from the register." [148]

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143. r.196.

144. In para. 1 above.

145. s. 3(xv)(a), (b).

146. For the sake of simplicity we leave out of account here the special position of land subject to the Settled Land Act 1925.

147. s. 2(1).

148. s. 74.

If the trustees' power of disposition is limited, this can appear on the register as a restriction;[149] commonly, the only restriction (and the only reference on the register to the existence of the trust) is one requiring a purchaser to pay the purchase money to two registered proprietors (or a trust corporation). That is the extent of the protection which the register can legitimately give to the equitable rights of the beneficiaries.

98. In those circumstances it is surprising to find that the Registrar is bound to keep something called The Minor Interests Index. As will be seen, however, the Index is very far from being, in effect, a register of minor interests; and it is provided by the Rules that the entries in it do not form part of the register of title and, further, that no purchaser of a registered estate is concerned with it.[150]

The statutory origin of the Index and its functions

99. The Index does not appear by name anywhere in the Act itself but section 102(2) provides for the lodgment at the Registry of certain priority cautions and inhibitions in "a specially prescribed form".[151] The section goes on to say that these should be lodged "against the proprietor of the registered estate affected", thus suggesting that the entries should be made on the register; but since the priority cautions and inhibitions in question relate solely to equitable interests under trusts it would have been contrary to principle for them to have appeared on the register itself. In giving effect to the section therefore the Index was set up by rule 11 as a record wholly separate from the register. The remainder of the statutory provisions relating to the Index are contained in rules 229 and 290(2).

149. s. 58.

150. r. 11(2).

151. The priority cautions and priority inhibitions used in connection with the Minor Interests Index are quite distinct from cautions against first registration (s.53) and cautions and inhibitions against dealings (ss. 54 and 57).

100. The function of the Index is to record certain dealings with certain equitable interests in registered land. By section 102(2), the order of the cautions and inhibitions entered in the Index governs the question of priority as between successive assignments or mortgages of the same interest. This constitutes a modification, in the context of registered land, of the general law.

Priorities of dealings in equitable interests

(i) General rule

101. It is necessary first of all to state the general rule governing the priorities of dealings with equitable interests. It was decided in Dearle v. Hall[152] that priority as between successive mortgagees of an equitable interest in pure personal estate should be determined not by the dates on which the interest was mortgaged but by the dates on which notice of the dealings was given to the trustees of the fund. This principle which became known as "the rule in Dearle v. Hall" was subsequently extended to all equitable things in action, and by section 137 of the Law of Property Act 1925 it was further extended to dealings with equitable interests in land taking effect after 31 December 1925. In general, therefore, a mortgagee of any equitable interest will immediately give written notice of the transaction to the trustees in order to preserve his priority over subsequent mortgagees.

102. Where it is either impossible or impracticable to give notice to the trustees, section 137 makes provision for the endorsement of an appropriate memorandum on the trust instrument. By section 138 a trust corporation may be nominated to receive notices in the place of the trustee, and a trust corporation so acting is required to keep a register of the dealings in respect of each equitable interest. (This provision is seldom used).

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152. (1828) 3 Russ. 1.

(ii) The rule for equitable interests in registered land

103. Section 137 of the Law of Property Act 1925 is not in terms restricted in its application to unregistered land but it seems clear that it does not apply to regulate priorities in all cases of dealings with equitable interests in registered land, because a different procedure (involving the Minor Interests Index) was introduced for some such cases by section 102(2) of the (Land Registration) Act. The subsection reads as follows:-

> "Priorities as regards dealings effected after the commencement of this Act between assignees and incumbrancers of life interests, remainders, reversions and executory interests shall be regulated by the order of the priority cautions or inhibitions lodged (in a specially prescribed form) against the proprietor of the registered estate affected, but, save as aforesaid, priorities as between persons interested in minor interests shall not be affected by the lodgment of cautions or inhibitions."

104. It is clear that the priority caution (or inhibition) procedure under this subsection only applies where there has been a dealing with a present or future interest under a trust[153] and that the priority of, for example, a mortgage of any other type of equitable interest in registered land is left to be governed by section 137 of the Law of Property Act. On the wording of section 102(2) it is perhaps arguable that it does not apply to all assignments or mortgages of trust interests, but only to dealings between assignees or incumbrancers of such interests and on that construction the procedure does not apply to regulate the priorities of successive mortgages effected by the life tenant or the remainderman under the trust. The Land Registry has, however, always accepted applications for the entry of priority cautions on the Index from life tenants' and remaindermens' own mortgagees. Another question is whether for the purposes of the subsection the equitable interest dealt with has to be in

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153. i.e. of the classes mentioned in the subsection.

registered land itself; it is understood, however, that the Registry will make entries in the Index relating to dealings with trust interests arising under trusts for sale of registered land (where the equitable interests are, strictly speaking, not in land but in pure personalty).

105. If a trust corporation has been nominated under section 138 of the Law of Property Act 1925 to receive Dearle v. Hall notices, that section applies as if the Chief Land Registrar were the nominated corporation so far as dealings in equitable interests in registered land are concerned, and the notices find their way onto the Minor Interests Index as priority cautions or inhibitions instead of on to the corporation's register. Rule 229(5), which effects the substitution, is very short and raises a number of questions. One result may be that dealings with equitable interests not under trusts may get onto the Index. Further, it is not entirely clear whether rule 11(2) (which provides that the Index shall be in such form and contain such particulars as the Registrar may from time to time determine) overrides section 138(7) of the Law of Property Act which specifies with some particularity what the trust corporation's register should contain. Since section 138 is, we understand, seldom operated these problems are largely academic.

Minor Interests Index unnecessary

106. It has been said that the Index, which exists solely for the benefit of the owners of particular minor interests and persons dealing with them, was set up to compensate in some measure persons whose legal interests had been converted into equitable interests by section 1 of the Law of Property Act 1925.[154] Nevertheless, whatever may have been the reason for the institution of the Index it seems to be unnecessary now and this is the view of the overwhelming majority of those with whom we have already consulted on the matter. It is, moreover, unsatisfactory that the Index is applicable only to

154. See Brickdale and Stewart-Wallace, Land Registration Act 1925, 4th ed. 244.

some and not to all the matters affecting land to which the rule in Dearle v. Hall now applies. Moreover, it gives rise to all sorts of anomalies. There are cases where registered land does not form the whole of a trust fund. Mortgagees may not know whether the land included in the trust fund is registered or not. Yet priorities in respect of dealings with equitable interests in registered land will be governed by the date of entry on the Index, whereas priorities in respect of the rest of the fund will be governed by the date of notice to the trustees. Furthermore, subsequent changes in the composition of the trust fund may give rise to difficulties in regard to priorities.

107. The use to which the Minor Interests Index is put

We set out below a summary, which the Chief Land Registrar has been good enough to prepare for us, of all the applications affecting this Index from 1959 to 1970. We do not know the total number of transactions effected in England and Wales during those years relating to equitable interests under trusts of land[155] and, in particular, of registered land, but it will be seen that over a period of 11 years only 17 inspections of this Index were made.

Year	Priority Cautions	Priority Inhibitions	Inspections of Index	Withdrawals
1959	7	1	-	-
1960	20	2	5	-
1961	10	-	7	-
1962	11	1	-	-
1963	2	-	-	-
1964	-	-	-	-
1965	1	-	1	-
1966	-	-	-	-
1967	9	-	-	-
1968/69	2	-	1	1
1969/70	3	-	3	8
Totals	65	4	17	9

155. Mentioned in para. 102 above.

Provisional conclusions

108. We think that section 102(2) and (3) should be repealed and rules 11, 229 and 290(2) revoked, leaving section 137 of the Law of Property Act 1925 to apply to regulate the priorities of dealings with all equitable interests in land, registered as well as unregistered. There would have to be transitional provisions dealing with the existing entries on the Minor Interests Index, but these may be simplified by the fact that under rule 229(1) the trustees already have notice of the dealings, having been informed by the Registry of the making of the entries on the Index.

PART D SUMMARY OF PROVISIONAL CONCLUSIONS

As to overriding interests (Part B Paragraphs 1 to 95)

1. None of the following interests should constitute overriding interests:-

(i) Interests (such as rights of way) created by the proprietor out of registered land and which are required to be noted on the title to the burdened land (Para. 13); but interests which the Registrar is not required to note on the register on the grounds of triviality etc. must, as at present, be overriding interests. (Para. 13, footnote 25).

(ii) Interests which are capable of registration as separate titles. (Many leases fall within this category) (Para. 14).

(iii) Except in the special circumstances set out in 2 below, interests (such as estate contracts and equitable easements) which are capable of protection on the register and which correspond substantially to those matters which are registrable in the register of Land Charges where they affect unregistered land. (Paras. 15-20).

2. Where an interest of the type described in 1(iii) above (commonly an option to purchase or to renew) is actually contained in a lease, it should not be necessary to protect it by a specific entry on the register. If the lease containing the interest itself constitutes an overriding interest, the interest should be an overriding interest. (Para. 21).

3. The Act and Rules seem to deal satisfactorily with the application of the statutory covenants for title to overriding interests. (Paras. 22-33).

4. Section 70(1) of the Act (set out in Appendix 1) should be amended in the following respects:-

paragraph (a): certain of the rights listed in the paragraph overlap with others and could be taken out (Paras. 38, 39, 43 and 44). The reference to "customary rights (until extinguished)" should be to rights arising under custom. (Para. 41).

paragraphs (b) and (e): certain of the matters mentioned in these paragraphs have been extinguished and could be taken out. (Paras. 51 and 54).

paragraph (g): the scope of this paragraph should be reduced so as to limit the protection under it to contractual rights of occupation of persons in actual and apparent occupation of the land. Protection should no longer be given under the paragraph to the rights of persons in receipt of rents and profits of land, or to any of the interests mentioned in 1 above. (Paras. 56 to 77).

paragraph (i): the definition of "local land charges" should make it clear that the expression includes all matters registrable in a register of local land charges. (Paras. 81 and 82).

paragraph (j): the reference to fishing and sporting rights should be to fishing and sporting rights of a lord of a manor and not to such rights generally. (Para. 84).

paragraph (k): as suggested in our first Working Paper (No.32), all leases or tenancies for terms of 21 years or less should be overriding interests whether or not granted at a rent or at a premium. The words "granted at a rent without taking a fine" should, therefore, be deleted. (Para. 88). (Protection as overriding interests under this paragraph should not be limited to those leases or tenancies where the tenant is in actual occupation. Paras. 89-93).

5. Apart from the changes suggested in 4 above, all the other existing heads of overriding interest must remain.

6. Consideration should be given to listing in any provision replacing section 70(1) all matters which, for the time being, are overriding interests; and it is suggested that the text of that provision should be amended on each occasion that the list is added to or varied by subsequent legislation. (Paras. 49 and 72).

A list of overriding interests, giving effect to 4 and 5 above, is set out in Appendix 2.

As to the Minor Interests Index (Part C Paragraphs 96 to 108)

The rule in Dearle v. Hall should apply to regulate the priorities of dealings with equitable interests in registered as well as unregistered land. The Minor Interests Index should be abolished.

APPENDIX 1

LAND REGISTRATION ACT 1925, SECTION 70

(as now in force)

Liability of registered land to overriding interests.

70.(1) All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act, (that is to say):-

(a) Rights of common, drainage rights, customary rights (until extinguished), public rights, profits à prendre, rights of sheepwalk, rights of way, watercourses, rights of water, and other easements not being equitable easements required to be protected by notice on the register;

(b) Liability to repair highways by reason of tenure, quit-rents, crown rents, heriots, and other rents and charges (until extinguished) having their origin in tenure;

(c) Liability to repair the chancel of any church;

(d) Liability in respect of embankments, and sea and river walls;

(e) ... payments in lieu of tithe, and charges or annuities payable for the redemption of tithe rentcharges;

(f) Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts;*

(g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed;

(h) In the case of a possessory, qualified, or good leasehold title, all estates, rights, interests, and powers excepted from the effect of registration;

(i) Rights under local land charges unless and until registered or protected on the register in the prescribed manner;

(j) Rights of fishing and sporting, seignorial and manorial rights of all descriptions (until extinguished), and franchises;

(k) Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine;

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* Now the Limitation Act 1939.

(1) In respect of land registered before the commencement of this Act, rights to mines and minerals, and rights of entry, search, and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals or of property in mines or minerals, being rights which, where the title was first registered before the first day of January, eighteen hundred and ninety-eight, were created before that date, and where the title was first registered after the thirty-first day of December, eighteen hundred and ninety-seven, were created before the date of first registration:

Provided that, where it is proved to the satisfaction of the registrar that any land registered or about to be registered is exempt from land tax, or tithe rentcharge or payments in lieu of tithe, or from charges or annuities payable for the redemption of tithe rentcharge, the registrar may notify the fact on the register in the prescribed manner.

(2) Where at the time of first registration any easement, right, privilege, or benefit created by an instrument and appearing on the title adversely affects the land, the registrar shall enter a note thereof on the register.

(3) Where the existence of any overriding interest mentioned in this section is proved to the satisfaction of the registrar or admitted, he may (subject to any prescribed exceptions) enter notice of the same or of a claim thereto on the register, but no claim to an easement, right or privilege not created by an instrument shall be noted against the title to the servient land if the proprietor of such land (after the prescribed notice is given to him) shows sufficient cause to the contrary.

APPENDIX 2

SUGGESTED LIST OF OVERRIDING INTERESTS

Interests	Present source
Public rights	s.70 (1) (a)
Rights arising under custom	"
Rights of water, not being easements	"
Easements and profits à prendre other than:-	"
(a) Equitable easements and equitable profits	
(b) Those expressly granted or reserved out of registered land and whose creation requires to be completed by registration and also noting on the register of the title of the servient land	
Adverse easements as provided for in rule 258	r.258
Liability to repair highways by reason of tenure	s.70 (1) (b)
Liability to repair the chancel of any church	s.70 (1) (c)
Liability in respect of embankments, and sea and river walls	s.70 (1) (d)
Tithe redemption annuities, payments in lieu of tithe and charges or annuities payable for the redemption of tithe rentcharges	s.70 (1) (e) and Tithe Act 1936, s.13 (11)
Rights acquired or in the course of acquisition under the Limitation Acts	s.70 (1) (f)
Certain contractual rights to occupy land of persons in actual and apparent occupation of the land	s.70 (1) (g)
Matters excepted from the effects of registration in the case of possessory, qualified or good leasehold titles	s.70 (1) (h)
Rights under any matter registrable in a register of local land charges unless and until protected on the land register	s.70 (1) (i)
The fishing and sporting rights of a lord of a manor	s.70 (1) (j)

Seignorial and manorial rights of all descriptions (until extinguished) and franchises	s.70 (1) (j)
Leases for any term or interest not exceeding 21 years	s.70 (1) (k)
Certain old mineral rights	s.70 (1) (l)
The rights of the National Coal Board in respect of mines and minerals	Coal Act 1936, s.41